Mejar Huzairein bin Hj Yacob & Ors v Staf Sarjan Nur Aizam bin Hamali

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-01(NCVC)(W)-386–05 OF 2022
AZIZAH NAWAWI, CHE MOHD RUZIMA AND AZMI ARIFFIN JJCA
24 OCTOBER 2023

Tort — False imprisonment — Arrest — Unlawful detention of army — High Court allowed plaintiff's action for unlawful detention — Plaintiff failed to name officer who issued arrest order as defendant — Whether it was possible to maintain successful claim in tort against governments as primary tortfeasors when plaintiff failed to name officer responsible for alleged wrongdoing as defendant — Whether arrest and detention of plaintiff was in accordance with law — Armed Forces Act 1972 ss 51 & 87 — Armed Forces (Court Martial) Rules of Procedure 1976 r 16(1) — Criminal Procedure Code s 388(5) — Government Proceedings Act 1956 ss 5 & 6

The respondent ('the plaintiff') at the material time was a staff sergeant of the Royal Malay Regiment. The plaintiff was charged in the court-martial under s 51 and alternatively under s 87 of the Armed Forces Act 1972 as his urine was found positive for amphetamine and methamphetamine. The trial against the plaintiff started upon the order issued by the second defendant in his capacity as 'Pihak Berkuasa Sidang'. The plaintiff was initially put under close arrest but due to several adjournments, he was ordered to be released until the next hearing. Subsequently, the second defendant was replaced by Brigadier General Khairul Azmizal bin Ahmad Natal ('SD4'). The trial was then adjourned to allow the parties to prepare their written submissions. Upon the order issued by SD4 ('the arrest order'), the plaintiff was placed under close arrest from 10 June 2019 until 5 July 2019 and the trial was postponed. On 23 October 2019, the court-martial found the plaintiff not guilty, and he was acquitted and discharged of the offence. The plaintiff then filed an action in the High Court against the defendants for unlawful detention and the action was allowed by the learned judicial commissioner ('JC'), hence, the present appeal. The issues to be determined were: (a) whether the plaintiff correctly named the second defendant as a party to this action; and (b) whether the placement of the plaintiff under arrest from 10 June 2019 until 5 July 2019 was done in compliance with the law.

Held, allowing the appeal, and setting aside the JC's decision with costs of RM10,000 here and below:

(1) Pursuant to ss 5 and 6 of the Government Proceedings Act 1956, it was trite law that in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his responsibility be established before the Government could be made liable vicariously as principal. In the present appeal, the officer who issued the arrest order was SD4, but he was not named as a party. Since SD4 (who was responsible for the alleged wrongdoing) was not joined as a defendant to the action, it was therefore not possible in law to maintain a successful claim in tort against the governments as primary tortfeasors. On this ground alone, the appeal should be allowed (see paras 18 & 20).

(2) Rule 16(1) of the Armed Forces (Court Martial) Rules of Procedure 1976 ('the 1976 Rules') provided that '(1) During his trial by a court martial the accused shall be held under close arrest ...'. The 1976 Rules were silent as to whether the authority could revoke the initial order to release the plaintiff by issuing a fresh order to place the plaintiff in lawful custody. However, in the absence of specific provision, the court-martial was allowed to refer to the Criminal Procedure Code. Section 388(5) of the Criminal Procedure Code allowed the court, at any subsequent stage of any proceeding, to cause any person who had been released to be arrested and commit him to custody. In the present appeal, the initial order had been revoked by SD4 and the plaintiff had been arrested and detained in lawful custody based on reasonable grounds that there was a concern that the plaintiff would not attend the trial upon being charged with new offences and given a stern warning by the first defendant. As such, SD4 had given reasonable grounds to revoke the earlier order (see paras 21–25).

[Bahasa Malaysia summary

Responden ('plaintif') pada masa yang material adalah seorang staf sarjan Rejimen Askar Melayu Diraja. Plaintif didakwa di mahkamah tentera di bawah s 51 dan secara alternatif di bawah s 87 Akta Angkatan Tentera 1972 kerana air kencingnya didapati positif amphetamine dan methamphetamine. Perbicaraan terhadap plaintif bermula atas perintah yang dikeluarkan oleh defendan kedua atas kapasitinya sebagai 'Pihak Berkuasa Sidang'. Plaintif pada mulanya ditahan secara tertutup tetapi disebabkan beberapa penangguhan, dia diarah dibebaskan sehingga perbicaraan seterusnya. Selepas itu, defendan kedua digantikan oleh Brigadier Jeneral Khairul Azmizal bin Ahmad Natal ('SD4'). Perbicaraan kemudiannya ditangguhkan untuk membolehkan pihak-pihak menyediakan penghujahan bertulis mereka. Atas perintah yang dikeluarkan oleh SD4 ('perintah penahanan'), plaintif telah diletakkan di bawah penahanan tertutup dari 10 Jun 2019 hingga 5 Julai 2019 dan perbicaraan telah ditangguhkan. Pada 23 Oktober 2019, mahkamah tentera mendapati plaintif tidak bersalah, dan dia dibebaskan dan dilepaskan daripada kesalahan tersebut.

Plaintif kemudian memfailkan tindakan di Mahkamah Tinggi terhadap defendan-defendan untuk penahanan tidak sah dan tindakan tersebut dibenarkan oleh pesuruhjaya kehakiman ('PK'), justeru, rayuan semasa. Isu-isu yang perlu ditentukan ialah: (a) sama ada plaintif menamakan dengan betul defendan kedua sebagai pihak dalam tindakan ini; dan (b) sama ada penempatan plaintif di bawah tahanan dari 10 Jun 2019 hingga 5 Julai 2019 telah dilakukan mengikut undang-undang.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan PK dengan kos sebanyak RM10,000 di sini dan di bawah:

(1) Berdasarkan ss 5 dan 6 Akta Prosiding Kerajaan 1956, adalah menjadi undang-undang yang mantap bahawa dalam mana-mana tuntutan tort terhadap Kerajaan, pegawai Kerajaan yang bertanggungjawab ke atas dakwaan perbuatan tort tersebut mesti dijadikan pihak dan tanggungjawabnya dibuktikan sebelum Kerajaan boleh dipertanggungjawabkan secara vikarius sebagai prinsipal. Dalam rayuan semasa, pegawai yang mengeluarkan perintah penahanan tersebut ialah SD4, tetapi dia tidak dinamakan sebagai pihak. Memandangkan SD4 (yang bertanggungjawab atas dakwaan salah laku tersebut) tidak disertakan sebagai defendan kepada tindakan tersebut, maka adalah tidak mungkin dalam undang-undang untuk mengekalkan tuntutan yang berjaya dalam tort terhadap kerajaan sebagai pelaku tort utama. Atas alasan ini sahaja, rayuan harus dibenarkan (lihat perenggan 18 & 20).

(2) Kaedah 16(1) Kaedah-Kaedah Tatacara Angkatan Tentera (Mahkamah Tentera) 1976 ('Kaedah 1976') memperuntukkan bahawa '(1) During his trial by a court martial the accused shall be held under close arrest ...'. Kaedah 1976 tersebut tidak menyatakan sama ada pihak berkuasa boleh membatalkan perintah awal untuk membebaskan plaintif dengan mengeluarkan perintah baharu untuk meletakkan plaintif dalam tahanan yang sah. Bagaimanapun, jika tiada peruntukan khusus, mahkamah tentera dibenarkan merujuk kepada Kanun Tatacara Jenayah. Seksyen 388(5) Kanun Tatacara Jenayah membenarkan mahkamah, pada mana-mana peringkat prosiding berikutnya, untuk menyebabkan mana-mana orang yang telah dilepaskan untuk ditangkap dan mengkomitkannya ke dalam tahanan. Dalam rayuan ini, perintah awal telah dibatalkan oleh SD4 dan plaintif telah ditangkap dan ditahan dalam jagaan yang sah berdasarkan alasan munasabah bahawa terdapat kebimbangan bahawa plaintif tidak akan menghadiri perbicaraan apabila didakwa dengan kesalahan baru dan diberikan amaran keras oleh defendan pertama. Oleh itu, SD4 telah memberikan alasan yang munasabah untuk membatalkan perintah terdahulu (lihat perenggan 21–25).]

Cases referred to

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1, FC (refd)

Legislation referred to

Armed Forces Act 1972 ss 51, 87, 96(3)
Armed Forces (Court Martial) Rules of Procedure 1976 r 16(1)
Criminal Procedure Code s 388(5)
Government Proceedings Act 1956 ss 4, 5, 6
Rules of Court 2012 O 4 r 2

Appeal from: Civil Suit No MA-21NCvC-10–12 of 2019 (High Court, Malacca)

Mohd Radzi Shah bin Ab Razak (Attorney General's Chambers) for the appellant.
Abdul Latiff Idham bin Mohd Suhaimi (wtih Ghufranik bin Abdul Hamid) (Azman & Affendy) for the respondant.

Azmi Ariffin JCA:

INTRODUCTION

[1] Enclosure 83 dated 24 May 2022 is the appellants appeal to the Court of Appeal against the whole of the learned judicial commissioner decision delivered on 28 April 2022 allowing respondent claim of para 17(a), (b) and (c) of statement of claim. The following orders were made against the appellants:

(a) A sum of RM52,000.00 to be paid by the Appellants as damages for unlawful detention calculated in the sum of RM2,000 per day for a period of 26 days;

(b) Interest of 5% per annum calculated daily from the date the claim was filed until the date of Judgment;

(c) Interest of 5% per annum calculated daily from the date of judgment until full settlement; and

(d) Costs of RM15,000.00 be paid jointly and severally by the Defendants to the Plaintiff.

[2] Parties will be referred to as plaintiff and defendants respectively in this judgment.

BRIEF FACTS

[3] The plaintiff ('SPI') during the material times was a Staff Sergeant of the Royal Malay Regiment stationed in Kompeni PANDURA ('Para'), Terendak Camp, Malacca.

[4] On 20 July 2017, plaintiff was charged in court martial under s 51 and alternative charge under s 87 of the Armed Forces Act 1972 (Act 77) as his urine was found positive for amphetamine and methamphetamine.

[5] The plaintiff was put under close arrest from 6 June 2017 until 12 June 2017 in accordance with the provisions under s 96(3) of the said Act.

[6] The trial started on 16 March 2018 upon the order issued by the second defendant in his capacity as 'Pihak Berkuasa Sidang'. However, due to several adjournment, the plaintiff was ordered to be released from arrest until the next hearing as required under r 16(1) of the Armed Forces (Court Martial) Rules of Procedure 1976.

[7] On 23 October 2018, 'Pihak Berkuasa Sidang' was replaced by Brigadier General Khairul Azmizal bin Ahmad Natal ('SD4').

[8] Trial resumed on 4 April 2019. The court martial proceedings were adjourned to 17 June 2019 in order to allow parties time to prepare their written submissions for the end of defence case.

[9] From 10 June 2019 until 5 July 2019, plaintiff was placed under close arrest upon order issued by SD4.

[10] On 17 June 2019, the trial was postponed and a new hearing date was fixed on 23 December 2019.

[11] On 19 June 2019, learned counsel for the plaintiff wrote a letter to the first defendant ('SD2') seeking for the plaintiff's released from close arrest.

[12] Via letter dated 24 June 2019, SD2 replied through Captain Muhammad Saffuan bin Zainol Rashid ('SD3') stating that the reasons for the arrest were made in accordance under r 16(1) of the Armed Forces (Court Martial) Rules of Procedure 1976.

[13] On 23 October 2019, the military court found the plaintiff not guilty as charged and he was acquitted and discharged of the offence.

[14] On the 27 December 2019, the plaintiff filed this action against the three defendants. In the statement of claim, the plaintiff sought the following relief:

(a) Sejumlah wang Ringgit Malaysia Lima Puluh Dua Ribu (RM52,000.00) sahaja dibayar oleh Defendan-Defendan sebagai ganti rugi tahanan secara tidak sah (unlawfully detained) selama 26 hari dikira dengan RM2,000.00 sehari;

(b) Faedah sebanyak lima peratus (5%) setahun dikira secara harian mulai tarikh pemfailan sehingga tarikh Penghakiman;

(c) Faedah sebanyak lima peratus (5%) setahun dikira secara harian mulai Tarikh Penghakiman sehingga tarikh penyelesaian penuh;

(d) Kos tindakan;

(e) Kos guaman sebanyak RM10,000.00 atas dasar klien peguamcara;

(f) Ganti rugi am dan khas yang akan ditaksirkan oleh Mahkamah yang Mulia;

(g) Ganti rugi teladan sebanyak RM200,000.00; dan

(h) Sebarang relif yang difikirkan patut dan suai manfaat oleh Mahkamah yang Mulia.

[15] On 28 April 2022 learned judicial commissioner granted order in terms of para 17(a), (b) and (c) of the statement of claim and awarded costs in the sum of RM15,000.

[16] Hence this appeal.

THE RELEVANT PROVISION OF LAW

[17] The law applicable are as follows:

(a) s 51 of the Armed Forces Act 1972(Act 77) provides that:

> 51 Disobedience to standing orders
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> (1) Every person subject to service law under this Act who contravenes or fails to comply with any provision of orders to which this section applies, being a provision known to him or which he might reasonably be expected to know, shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.
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> (2) This section applies to standing orders or other routine orders of a continuing nature for any formation or unit or body of troops, or for any command or other area, establishment, garrison or place, or for any ship, train or aircraft.

(3) The standing orders or other routine orders described in subsection (2) may be —

(a) made by; and

(b) published in such manner as may be determined by, the Service Chief for each Service or any officer authorised by him.

(b) s 87 of the Armed Forces Act 1972 (Act 77) provides that:

87 Conduct to the prejudice of service discipline

Every person subject to service law under this Act who is guilty of any act, conduct or neglect to the prejudice of good and service discipline, shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

(c) s 96(3) of the Armed Forces Act 1972 (Act 77) provides that:

96 Charges to be dealt with summarily or by court-martial

(3) If, after investigation, any charge is not dealt with summarily as aforesaid, the accused shall be remanded for trial by court-martial.

(d) r 16(1) of the Armed Forces (Court Martial) Rules of Procedure 1976 provides that:

16 Arrest during and after trial.

(1) During his trial by a court-martial the accused shall be held under close arrest, except where the convening authority directs that for the period of any adjournment of the court he shall be held under open arrest or released from arrest.

(e) s 5 of the Government Proceedings Act 1956 provides that:

5 Liability of the Government in tort

Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extentas that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

(f) s 6 of the Government Proceedings Act 1956 provides that:

6 Limits of liability of the Government

(1) No proceedings shall lie against the government by virtue of s 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

(2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in relation to the government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.

(3) No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

(4) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

(5) For the purposes of subsection (4) the expression 'appropriate financial officer' means, in respect of the Federal Government, the Minister of Finance, and in respect of the Government of a State, the State Financial Officer, and, in the case of the States of Sabah and Sarawak, the State Minister responsible for finance.

(g) O 4 r 2 of the Rules of Court 2012 provides that:

Consolidation of causes or matters (O 4 r 1)

(2) An order for consolidation shall be made in Form 1 and shall direct that the cause or matter in which the application is made shall be carried on as or under such other cause or matter and that the title of such other cause or matter be amended by adding thereto the title of the cause or matter in which the application is made.

(h) s 388(5) of the Criminal Procedure Code provides that:

388 When person accused of non-bailable offence may be released on bail

(5) Any Court may at any subsequent stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody.

MAIN ISSUES FOR DETERMINATION

(a) whether the plaintiff correctly named the second defendant as a party to this action; and

(b) whether placing the plaintiff under arrest from 10 June 2019 until 5 July

2019 were done in compliance with the law. A

OUR DECISION

[18] On the first issue it is settled law that under ss 5 and 6 of the Government Proceedings Act 1956, provides that 'in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his responsibility be established before the Government can be made liable vicariously as principal'. B

[19] In this context, one must not lose sight the case which is directly on point none other than the case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1 where the Federal Court through the judgment of Nik Hashim FCJ (as he then was) held as follows: C

> [12] It is worthy of note that Act 359 was enacted in 1956 to amend and consolidate all laws relating to proceedings against the Federal and State Governments. This law contains substantive provisions creating rights to directly sue the Government and in case of tort to sue the Government vicariously. Section 4 of Act 359 prescribes that proceedings may be directly brought against the Government if the claim is one relating to use or occupation or right to use or occupation of land; revenue matters, contractual; claims (other than tort) for damages or compensation lawfully enforced by civil proceedings as between subject and subject; whereas ss 5 and 6 provide for liability of the government in tort. D E
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> [16] Therefore, on the proper construction of ss 5 and 6 of Act 359, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability be established before the Government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government. F
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> [17] In the present case, all the eight causes of actions are actions in tort or tort based premised on the act or omission of an individual. None of the Governments sued is capable of committing the wrong pleaded. Since the Governments' liability in tort can only be vicarious by virtue of ss 5 and 6 of Act 359, and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Governments as primary tortfeasors. That being so, the appellants' application to strike out the respondents' actions is meritorious. G H

[20] In the present appeal, the officer who issued the order dated 10 June 2019 was Brigedier General Khairul Azmizal bin Ahmad Natal ('SD4'). However, SD4 was not named as a party. Therefore, pursuant to the Federal Court decision in *Lay Kee Tee* since SD4 (who was responsible for the alleged wrongdoing) was not joined as a defendant to the action, the same cannot maintain a successful claim in tort against the Government as primary I

tortfeasors. On this ground alone, the appeal should be allowed.

[21] In relation to the second issue, it is pertinent to refer to r 16(1) of the Armed Forces (Court Martial) Rules of Procedure 1976 where it provides as follows:

> (1) During his trial by a court martial the accused shall be held under close arrest, except where the convening authority directs that for the period of any adjournment of the court he shall be held under open arrest or released from arrest.

[22] The 1976 Regulations is silent as to whether the authority can revoke the initial order to release the plaintiff by issuing a fresh order to place the plaintiff under lawful custody.

[23] However, in the absence of specific provision, O 4 r 2 of the Rules of Court 2012 allows the court martial to refer to the Criminal Procedure Code. In addition, s 388(5) of the Criminal Procedure Code, allows the court, at any subsequent stage of any proceeding, cause any person who has been released to be arrested and commit him to custody.

[24] In the present appeal, the initial order has been revoked by SD4 and the plaintiff has been arrested and detained in lawful custody based on reasonable grounds that there is a concern that the respondent will not attend the trial upon being charged with new offenses and given a stern warning by the first appellant. This can be discerned from the evidence of SD4:

> Saya telah menerima laporan daripada Mejar Huzairein bin Yacob bahawa Plaintif telah melakukan pelanggaran disiplin semasa dilepaskan dari tangkapan (bebas) dalam tempoh Mahkamah Tentera yang membicarakan kesnya ditangguhkan. Plaintif telah melakukan kesalahan Tidak Hadir Tanpa Cuti (THTC) selama 3 hari yang bertentangan dengan seksyen 55(a) Akta Angkatan Tentera 1972. Plaintif telah didapati bersalah dan dijatuhkan hukuman Amaran Keras. Oleh itu saya telah membatalkan arahan dilepaskan dari tangkapan semasa penangguhan Mahkamah Tentera dan mengarahkan agar Plaintif diletakkan dalam Tangkapan Rapi kerana dikhuatiri Plaintif akan melakukan kesalahan yang sama lagi dan dikhuatiri tidak menghadiri perbicaraan Mahkamah Tentera.

[25] As such, we are of the considered opinion that SD4 had given reasonable ground to revoke his earlier order.

CONCLUSION

[26] For the above reasons, we find that the learned JC was plainly wrong in her findings that warrant appellate intervention.

[27] The appeal is therefore allowed and the decision of the learned JC is set aside with costs of RM10,000 here and below.

Appeal allowed; JC's decision set aside with costs of RM10,000 here and below.

Reported by Dzulqarnain Ab Fatar